

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 684 of 1998

Date of decision: 22-12-1998

For Approval and Signature

The Hon'ble Ms. Justice R.M. DOSHIT

1. Whether Reporters of Local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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ISMAIL ADAM MITHA

Versus

STATE OF GUJARAT  
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Appearance:

MR AD SHAH for Petitioner

PUBLIC PROSECUTOR for Respondent No. 1  
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CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 22/12/98

## ORAL JUDGEMENT

Heard learned advocate Mr. A.D. Shah for the applicant, and learned APP Mr. S.R. Divetia for the State.

This application has been preferred by the accused No.1 in Sessions Case No.145/95 pending before the learned Sessions Judge, Kutchch at Bhuj. The accused has been charged for commission of offence punishable under the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act'). The trial has commenced. The prosecution has examined as many as 25 witnesses. Twentysixth witness for the prosecution is one Kiritbhai Ramjibhai Parmar, Circle Police Inspector, Nakhatrana, who is the investigating officer. In the course of the examination in chief, the witness (PW 26) was asked questions about the investigation he made in respect of the narcotic substances recovered from the accused No.1. Further question was asked in respect of the information received by PW 26 in course of investigation in respect of three Kgs. of brown sugar. In answer to the said inquiry PW26 has stated that three Kgs. of brown sugar (muddamal) was sent to Bombay for sale to one Ilias Patel, a resident of England, then residing at Hotel King, Room No.701, at Juhu Road, through Pankaj Shambhubhai (accused No.3) and Ilias Vali Mataria (accused No.4). At this juncture the defence advocate intervened and objected to this statement being received in evidence. It was contended that this was a confessional statement made before the investigating officer in the course of investigation and, in view of the provisions contained in sections 25 and 26 of the Evidence Act and section 162 of Cr.P.C., was not admissible in evidence. The objection was contested by the prosecutor. It was contended that the investigating officer was an authorised officer under the Act and statement made before him was not hit by sections 25 and 26 of the Evidence Act and was admissible in evidence. The defence advocate relied upon the Government notifications issued under sections 53 and 67 of the Act and submitted that police officer not having been authorised under the above referred notifications, the confessional statement made before him was not admissible in evidence. The objection was overruled by the learned trial Judge. The learned trial Judge, under his order dated 26th November, 1998, held that such statement was admissible in evidence. Feeling aggrieved, accused No.1 has preferred the present application under section 397(1) of Cr.P.C.

2. Mr. Shah has relied upon two notifications issued by the Central Government under sections 53 and 67 of the Act respectively, reproduced in the memo of the petition at pages 9 and 10. Notification No.S.C.823(E) has been issued in exercise of the powers conferred under subsection (1) of section 53 of the Act. Under the said notification the Central Government, after consultation with all the State Governments, has invested the officers of and above the rank of Inspector in the Departments of Central Excise, Narcotics, Customs, and Revenue Intelligence and in Central Economic Intelligence Bureau, with the powers specified in subsection (1) of section 53. Notification No.S.O.822(E) has been issued by the Central Government in exercise of the powers conferred under subsection (1) of section 42 and section 67 of the Act. Under the said notification the officers of and above the rank of Sub Inspector in the Department of Narcotics and of and above the rank of Inspector in the departments of Central Excise, Customs and Revenue Intelligence and in Central Economic Intelligence Bureau are empowered to exercise powers and perform the duties specified in section 42 within the area of their respective jurisdiction and are also authorised to exercise the powers conferred upon them under section 67.

3. Section 42 of the Act confers power of entry, search, seizure and arrest without warrant upon officers authorised by the Central Government or the State Government, as the case may be, to act under the said section. Section 53 of the Act empowers the Central Government to invest officers of certain departments with powers of an officer in charge of a police station. Section 53-A of the Act provides that a statement made and signed by a person before any officer, empowered under section 53 for the investigation of offences, during the course of any inquiry or proceedings by such officer, shall be relevant for the purpose of proving, in any prosecution for an offence under the Act, the truth of the facts which it contains. Section 67 of the Act empowers an officer authorised under section 42 of the Act to call for information.

4. Mr. Shah has contended that neither of the notifications issued under section 53 and sections 42 and 67 of the Act authorises a police officer to act under the respective provisions. A police officer, therefore, cannot be said to be an authorised officer as envisaged in section 53 of the Act and the provisions contained in section 53-A of the Act, therefore, cannot be invoked. In support of this contention he has relied upon the judgment of the Supreme Court in the matter of Raj Kumar

Karwal vs. Kirpal Mohan Virmani (AIR 1991 SC 45), and of this court in the matter of Kantilal Kalichandbhai vs. State of Gujarat (1998 (3) GLR 2147).

5. Mr. S.R.Divetia has contested this petition and has submitted that the investigating officer (PW 26), who is a police officer, is an authorised officer under the Act and in view of section 53-A of the Act the confessional statement made before him is admissible in evidence and is not hit by sections 25 and 26 of the Evidence Act or section 162 of Cr.P.C. In support of this contention he has relied upon the judgment of the Supreme Court in the matter of State of Gujarat vs. Anirudhsing (AIR 1997 SC 2780).

6. A bare perusal of the two notifications relied upon by Mr. Shah would disclose that under neither of the said notifications Police Officer appointed under the Bombay Police Act is authorised to act under the Act. In the matter of Raj Kumar Karwal (supra) the court was considering whether the officers of the Department of Revenue Intelligence, who have been invested with the powers of an officer in charge of a Police Station under section 53 of the Act are "Police Officers" within the meaning of section 25 of the Evidence Act. The court, having considered the scheme of the Act and the various judgments, in paragraph 20 of the judgment held that, "role of the officers effecting arrest or seizure, except in the case of a police officer, ends with the disposal of the person arrested and the article seized in the manner provided by Ss.52 and 52-A of the Act. Section 57 obliges the officer making the arrest or seizure to report the same to his superior within 48 hours. These powers are more or less similar to the powers conferred on Customs Officers under the Customs Act, 1962". Considering the provisions contained in the Act and Chapter XII of the Code of Criminal Procedure, the Court held, "if the investigation is conducted by the police, it would conclude in a police report, but if the investigation is made by an officer of any other department including DRI, the Special Court would take cognizance of the offence upon a formal complaint made by such authorised officer of the concerned Government. Needless to say that such a complaint would have to be under S.190 of the Code. This clause, in our view, clinches the matter. We must, therefore, negative the contention that an officer appointed under Sec.53 of the Act, other than a police officer, is entitled to exercise 'all' the powers under Chapter XII of the Code, including the power to submit a report or charge-sheet under S.173 of the Code".

7. Relying upon the above judgment this court in the matter of Kantilal Kalichandbhai (supra) in paragraph 10 of of the judgment held that the confessional statement made before a police officer is not admissible in evidence. In paragraph 10 of the judgment it is held that, "if a confessional statement is made to a police officer, the law says that such confession shall be absolutely excluded from the evidence because the person to whom it was made is not to be relied on for proving such a confession and is more susceptible of employing coercion to obtain confession".

8. In the matter of Anirudhsing(supra) the court was considering the confessional statement made by the accused before the State Reserve Police Officer who was present at the time of the incident. The Court held that this police officer was a mere witness and not an investigating officer, and the confessional statement made before him, therefore, would not be hit by section 25 of the Evidence Act.

9. In my view Mr. Shah is right in contending that neither of the notifications referred to by him empowers a police officer to act under the Act and the PW26, therefore, cannot be said to be an officer authorised under the Act. The confessional statement made before him in course of the investigation would, therefore, be not admissible in evidence. The contention is also supported by the judgment of the Supreme Court in the matter of Raj Kumar Karwal, and this court in the matter of Kantilal Kalichandbhai (supra). The confessional statement made before the investigating officer (PW26), therefore, is not admissible in evidence. The judgment in the matter of Anirudhsing (supra), on the facts of the case, does not lend support to the prosecution.

10. In view of the above discussion I am of the view that the learned trial Judge was not right in holding that the police officer is an officer authorised under the Act and the confessional statement made before him is admissible in evidence. The objection raised by the defence advocate is, therefore, sustained. The order made by the trial court on 26th November, 1998 on the objection raised by the defence advocate is set aside. The application is allowed. The answer of the investigating officer recorded on 26th November, 1998 and objected to by the defence advocate is ordered to be deleted from the evidence. Rule is made absolute accordingly. There shall be no order as to costs.

11. Learned APP Mr. Divetia prays that this order be stayed for a period of six weeks so as to enable the State to approach the higher forum. The request is rejected.

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